

DEFENDANT'S RIGHT TO BE PRESENT -- Trial in absentia, in general

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A criminal defendant has a right to be present at any proceeding in his case, but he may waive that right by voluntarily absenting himself from any hearing except sentencing¹. Rule 9.1, Ariz. R. Crim. P. The rationale for allowing trials in absentia was eloquently stated in *Diaz v. United States*, 223 U.S. 442, 457-58, 32 S.Ct. 250, 254-55, 56 L.Ed. 500 (1912). If trials in absentia were forbidden, an accused person could "prevent any trial whatever until the accused person himself should be pleased to permit it," which would be an intolerable travesty of justice:

The question is . . . whether an accused person, placed on trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce . . . [The law will not] allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, or during the pendency of a trial before a jury, to operate as a shield.

"The trial court may infer that a defendant's absence is voluntary if the defendant had personal knowledge of the time of the proceeding, his right to be present, and the warning that the proceeding would take place in his absence if he failed to appear." *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App.1996). Once the State shows that the defendant knew the trial date, a defendant who fails to appear for trial bears the burden of persuading the trial court that his absence was not voluntary.

¹ Rule 26.9., Ariz. R. Crim. P., requires a defendant to be present for sentencing:

The defendant is entitled to be present at a pre-sentencing hearing and shall be present at sentencing. In a capital case, the defendant is entitled to be present at both the aggravation and penalty hearings, and the return of any verdict.

State v. Tacon, 107 Ariz. 353, 356, 488 P.2d 973, 976 (1971)². Thus, if a defendant knows his trial date and that the trial may proceed in his absence, and nonetheless voluntarily fails to appear for trial, the trial may proceed in his absence. However, the Rule 9.1 presumption is rebuttable if the defendant presents evidence sufficient to convince the trial court that his absence was involuntary. *State v. Sainz*, 186 Ariz. 470, 473, 924 P.2d 474, 477 (App. 1996). The trial court's decision whether the absence was voluntary is fact-intensive and is subject to review only on an abuse of discretion standard. *State v. Holm*, 195 Ariz. 42, 43, ¶ 2, 985 P.2d 527, 528 (App. 1998), *citing* *State v. Bishop*, 139 Ariz. 567, 568, 967 P.2d 1054, 1056 (1984).

A defendant has a duty to keep himself informed of changes in his trial date by staying in touch with his attorney. In *State v. Holm*, 195 Ariz. 42, 43, 985 P.2d 527, 528 (App. 1998), the defendant was advised at his arraignment that if he failed to appear for any future proceedings, the trial could proceed in his absence. He was released and absconded; when he failed to appear for trial, he was tried in absentia and convicted. On appeal, he argued that he did not voluntarily waive his presence at trial because he mistakenly believed that the trial was scheduled for May 9 rather than May 6. The Court of Appeals rejected this argument, noting that under *State v. Love*, 147 Ariz. 567, 570, 711 P.2d 1240, 1243 (App. 1985), "It is the responsibility of an out-of-custody defendant to remain in contact with his or her attorney and with the court." Having failed to do so, the defendant could not "benefit from her misconduct by manipulating a rule designed for her protection." *Id.* The *Holm* Court then reasoned that if the defendant had met his

² Petition for Writ of Certiorari was accepted by the U.S. Supreme Court, *Tacon v. Arizona*, 407 U.S. 909, 92 S.Ct. 2446 (1972), and then dismissed, *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998 (1973), as the Constitutional issues had not been raised in the Arizona courts.

obligation to maintain contact with his lawyer, he would have been aware of the actual trial date. "Having failed to do so, he cannot now argue that his decision to violate his conditions of release by absconding was not a voluntary waiver of the right to be present at his trial." *State v. Holm*, 195 Ariz. 42, 43, at ¶ 4, 985 P.2d 527, 528 (App. 1998).

In *State v. Muniz-Caudillo*, 185 Ariz. 261, 914 P.2d 1353 (App. 1999), the defendant was released after the court informed him that he had to attend the pretrial conference. The defendant violated the terms of his release and the court issued a bench warrant. Defense counsel told the court that his client had not contacted him and asked for, and received, numerous continuances. However, eventually the trial was held in absentia and the defendant was convicted. On appeal, he argued that while he voluntarily left, it was unfair to hold the trial in his absence because he did not know when the trial was to begin. The Court of Appeals rejected that argument, noting that while the defendant was "technically without personal notice of his trial date," his absence was still voluntary because he failed to appear at any proceedings or keep in touch with his counsel. *Id.* at 262, 914 P.2d at 1354.

In *State ex rel. Thomas v. Blakey*, 211 Ariz. 124, 118 P.3d 639 (App. 2005), defendant Lugo, an undocumented alien, was indicted on drug and weapons offenses. He was advised of relevant dates and told he could be tried in absentia if he failed to appear. Lugo posted bail and was released into INS custody. While there, he requested and was granted voluntary departure to Mexico. When he did not appear for a pretrial conference, the state sought to try him in absentia. The Court of Appeals found that Lugo was voluntarily absent from trial, and the trial court erred by ruling that

Lugo could not be tried in absentia. “In choosing to voluntarily depart from this country without contacting the court or counsel, Lugo chose to be absent from the jurisdiction during the time when his trial was scheduled.” *Id.* at 127, 118 P.3d at 642.

Once the State shows that the defendant knew the trial date, or that he has voluntarily chosen not to keep track of the date, a defendant who fails to appear for trial bears the burden of persuading the trial court that his absence was not voluntary. *State v. Tacon*, 107 Ariz. 353, 357, 488 P.2d 973, 977 (1971). In *Tacon* the defendant moved out of state during the pretrial process, leaving a forwarding address with his attorney. When the trial date was set, the attorney wrote to tell Tacon, but Tacon did not appear for trial and was convicted in absentia. When Tacon returned to Arizona a few days later, he admitted that he had received his attorney's letter informing him of the new trial date. However, he argued that his absence was not "voluntary" because he lacked the money to travel back to Arizona. On cross-examination, he admitted that he had not asked his family for money because he had never told them that he was in trouble and did not want to embarrass them. The Arizona Supreme Court found that the trial court did not abuse its discretion in determining that Tacon's failure to appear was voluntary.

Even if a defendant is present when trial begins, if he fails to return for trial, he may waive his right to be present during the remainder of the trial. In *State v. Reed*, 196 Ariz. 37, 992 P.2d 1132 (App. 1999), the defendant was present on the first day of trial and the State had rested, with the defense's case to be presented the following afternoon. However, the defendant attempted suicide the next morning and was admitted to the hospital. The next morning, defense counsel, who was not yet aware of the suicide attempt, waived his client's presence at the settling of jury instructions and

did not object to the continuation of the trial. After the jury returned guilty verdicts, he moved for new trial, claiming that his absence was involuntary. The trial court held an evidentiary hearing at which a psychologist testified that the defendant was not competent to waive his right to be present. In contrast, a psychiatrist testified that the defendant was depressed, but not psychotic and that he had made a rational decision to abort his trial by killing himself. *Id.*, 39 at ¶ 4-7, 992 P.2d 1134 at ¶ 4-7. The Court of Appeals noted that, "depending on the circumstances, absence occasioned by attempted suicide may be a voluntary waiver of the right to be present at trial. . . . Because appellant made a voluntary decision to try to end his life and thereby avoid his trial, the trial court did not err in finding that his suicide attempt and consequent hospitalization constituted a voluntary waiver of his right to be present at the remainder of his trial." *Id.* at ¶ 7.